UNITED STATES
v.
BRUCE V. OPPERMAN

IBLA 87-495 Decided October 4, 1989

Appeal from a decision of Administrative Law Judge Michael L. Morehouse, declaring six lode mining claims invalid for lack of dis-covery of a valuable mineral deposit. OR MC 23938 through OR MC 23943.

Affirmed as modified.

1. Evidence: Prima Facie Case--Mining Claims: Contests

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a discovery, a prima facie case is established.

2. Mining Claims: Contests

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where a mining claimant's alleged discovery point is inaccessible due to caving, the Government is not responsible for restoring the accessibility of the site in order to conduct a mineral examination.

3. Board of Land Appeals--Mining Claims: Contests--Mining Claims: Determination of Validity

The motivation of the Forest Service in seeking the initiation of a contest against a mining claim located on National Forest lands is irrelevant, and once the Forest Service recommends the initiation of a contest to determine the validity of a mining claim and the Bureau

> of Land Management has determined that the elements of a contest are present, it is not the function of the Board of Land Appeals to inquire into the reasons or the justifications for the initiation of such a proceeding.

APPEARANCES: Bruce V. Opperman, pro se; Jocelyn B. Sommers, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Bruce V. Opperman has appealed from an April 9, 1987, decision by Administrative Law Judge Michael L. Morehouse, declaring the Eccentric, Domino, Tuxedo, Gold Bug, Buck Horn, and Wild Rose lode mining claims (OR MC 23938 through OR MC 23943) invalid for lack of discovery of a valuable mineral deposit. The claims are located in secs. 16, 17, 20, and 21, T. 10 S., R. 35 E., Willamette Meridian, within the Wallowa-Whitman National Forest, Oregon.

On June 28, 1986, the Bureau of Land Management, at the request of the Forest Service, U.S. Department of Agriculture, initiated this proceeding by issuing a contest complaint containing two charges: (1) none of the claims contained a discovery of a valuable mineral deposit and (2) two of the claims, the Eccentric and the Wild Rose, were being used for purposes not reasonably incident to mining. Judge Morehouse conducted a hearing in Portland, Oregon, on November 10, 1986. In his decision, Judge Morehouse found that the Government presented a prima facie case of lack of discovery of a valuable mineral deposit, and that appellant failed to present a preponderance of evidence to the contrary. 1/ He, therefore, declared the claims invalid. Opperman has appealed that determination.

1/ Judge Morehouse also found "with respect to paragraph 2 of the com-plaint that the Forest Service did not make a prima facie case because it was Mr. Opperman's testimony that he and his family only occupied one of the cabins on the claims during the summer in order to do assessment work" (Decision at 5). Judge Morehouse's reliance on Opperman's testimony to find the lack of a prima facie case on the occupancy issue is misguided. In such a situation, the determination of whether the Government presented a prima facie case is based upon the evidence presented by the Government. However, if the contestee goes forward after the Government rests its case, any testimony presented by the contestee which is adverse to its interests may be utilized by the Administrative Law Judge for purposes of making a decision. However, such testimony can never be the basis for a finding that the Government did not establish a prima facie case. United States v. Pool, 78 IBLA 170, 178 (1984). Thus, it appears that Judge Morehouse was actu-ally finding that Opperman's testimony served to rebut the Government's evidence as it related to the occupancy charge in the complaint. However, we need not speculate as to the exact nature of Judge Morehouse's finding because our review of the record of the hearing indicates that the Government was not interested in pursuing the occupancy charge. At the hearing, after a discussion between Judge Morehouse, Gary Kahn, and counsel for the

[1] When the United States contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it bears the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. When a Government examiner, who has had sufficient training and experience to qualify as an expert witness, testifies that he has physically examined a claim and found mineral values insufficient to indicate the discovery of a valuable mineral deposit, the United States has established a prima facie case that the claim is not supported by a discovery. United States v. Ledford, 49 IBLA 353, 355-56 (1980). The claimant, however, has the ultimate burden of persuasion, and it is incumbent upon the claimant to present evidence which is sufficient to overcome the Government's case on the issues raised. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Wolk, 100 IBLA 167, 170 (1983).

Judge Morehouse concisely summarized the relevant testimony presented at the hearing, as follows:

> Mr. Dan Avery, a mining geologist employed by the Forest Service, testified that he first saw the claims in 1979. The claims are located on the ground as indicated on the map contained in the mineral survey completed August 13, 1952 (See Ex. R-2). Subsequently after several attempts had been made to examine the claims with Mr. Opperman present, he and Mr. Opperman, together with Mr. Opperman's son, met on the claims on July 15, 1982, and an examination was made at that time. He testified that the previous owner, Mr. Frank Roberts, had applied for patent in 1953 after a mineral survey plat had been prepared. However, when the Government mineral examiner tried to examine the property in 1954, the tunnel on the Eccentric claim was caved-in and therefore mineral examination was impossible.
>
> Sometime subsequent thereto following passage of 30 U.S.C. § 612, an agreement was entered into between Mr. Roberts and the Forest Service whereby Mr. Roberts would withdraw his patent application, the matter would not proceed to a hearing, and the

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fn. 1 (continued)
Government, about the relationship between the two charges made by the Government in the contest complaint, the following exchange took place:

"MR. KAHN: Well, I'm saying that [occupancy] would be one of the factors to consider. Our primary concern is the validity here. We can dispense with this [apparently the occupancy charge].

"JUDGE MOREHOUSE: All right. He's not concerned with the second allegation; we're concerned with validity. Okay?

"THE WITNESS [Opperman]: Yes."

(Tr. 158). Kahn did not object to that limitation on the charges.

Therefore, given the fact that the Government abandoned the occupancy charge at the hearing, we find that it was unnecessary for Judge Morehouse to make his finding on occupancy, and we expressly reject it.

Forest Service was granted surface management rights on the claims pursuant to the Act. During his several visits to the claims, he noted there was a cabin located on the Wild Rose claim (Ex. G-2), a board cabin in fairly good repair on the Domino (Ex. G-3), a log structure in good repair on the Eccentric claim (Ex. G-4), and an old mill structure in fairly good repair on the Eccentric claim (Ex. G-6). He found old discovery cuts on all of the claims except the Tuxedo claim and stated that it was possible that a Forest Service road on the Tuxedo claim had obliterated such discovery cuts that might have been on that claim. However, during his examination in July 1982, he was told by Mr. Opperman that the only discovery relating to all six claims was inside the tunnel on the Eccentric claim which had been caved-in for a number of years. Because it was impossible to take any samples from the tunnel, he took two samples from an ore dump outside the tunnel. Following assay, one sample showed, .01 ounce gold per ton and no silver; the other showed no gold and .02 of an ounce per ton silver. He stated at these values an operator would only recover approximately $4.00 per ton and mining costs would run at least $100 a ton. In order to determine the economic viability of the claims, it would be necessary to open the tunnel and do exploratory work along its plus 600 foot length in order to determine whether adequate reserves of ore grade material existed. Based on his examination of the claims and the samples he took from the dump, it was his opinion that a reasonable man would not expend his time and money in the further exploration and development of the claims.

Mr. Opperman testified that he first was on the claims when he was 5 years old in 1922. The claims had been located by his uncle, Frank Roberts, in the late 1800's and the early 1900's. To his knowledge it was a working mine in 1926, and an adit had been driven into the hill from the Eccentric to an approximate length of 641 feet. His uncle, Frank, lived on the claims during the 1920's, 1930's and 1940's, and the mine was periodically worked. His uncle moved from the claims in approximately 1955. Following his uncle's death, he acquired the claims from the estate in approximately 1966 and continued to perform assessment work every summer up to the present time. He has made several attempts to reopen the portal to the adit on the Eccentric claim with little success. The area at the portal and for some distance in front of the portal is caved-in (See Ex. G-1); however, he was able to take two grab samples in 1980 from an area near the portal. These samples were just chunks of ore weighing about a total of 20 pounds. One sample assayed at 3.81 ounces per ton gold and 7.7 ounces per ton silver, the second sample assayed l.14 ounces per ton gold and 11.8 ounces per ton silver (See Ex. R-2). Due to these high values, a mining prospectus was prepared (Ex. R-2) and a potential investor from California became interested. The plan was to core drill the property so that an ore body could be blocked out; however, these plans were never carried out. It is his belief that

> if the tunnel can be cleared that ore of substantial value and quantity will be found to be present.

(Decision at 3-4).

Opperman contends on appeal that the Government mineral examiner incorrectly testified that the claims "did not have any present gold or mineral value and further more, never did have any" (Statement of Reasons at 1, emphasis in original). He asserts that gold valued at $10,000 was produced from a single surface pocket on the claim at a time when gold had a market value of $23 per ounce, and that at 1987 gold prices that production would be worth $195,750. At the hearing, he referred to a publication, Oregon Metal Mines Handbook, page 90 of which is included in Exhibit R-2 (Tr. 93). That undated excerpt, which reviews the history and development of the claims at issue, apparently up to the 1940's, states that "a total of $10,000 has been produced which was milled from small lenses washed out of soft sheared material." It further states that the property "has not been active in recent years."

The validity of any mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim. 30 U.S.C. | 22 (1982). A valuable mineral deposit exists if the mineral found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. United States v. Coleman, 390 U.S. 599, 602 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent person" test has been refined to require a showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). However, actual successful exploitation need not be shown-- only the reasonable potential for it. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). The question is not whether a profitable mining operation can be demonstrated, but whether, under the circumstances and based upon the mineralization exposed, a person of ordinary prudence would expend labor and means with the reasonable expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974).

Appellant misperceives the importance of the evidence related to past mining activity on the claims. Even assuming that $10,000 worth of minerals were removed from the claims sometime in the past, of paramount importance to a prudent person would be whether minerals are presently in place which would warrant an expenditure of funds and effort toward developing a mine. Thus, the fact that gold may have been extracted from one or more of these claims in the past does not establish a present discovery of a valuable mineral deposit.

Moreover, the only area that appellant indicated was a discovery area was the adit on the Eccentric claim. The adit was caved in and inaccessible, and appellant did not direct the examiner to any other sampling locations; therefore, the Government mineral examiner took two samples from an

ore dump on the Eccentric claim near the mouth of the caved-in adit. Those samples showed very low levels of gold and silver, much less than would be necessary even to recover the costs of operation. In the period of over 20 years that appellant has owned the claims, he has not cleared the adit nor has he sold any gold from the claims. 2/

[2] It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When such points are not accessible, the claimant assumes the risk that the mineral examiner will not be able to verify any alleged discovery of a valuable mineral deposit. United States v. Franklin, 99 IBLA 120, 125 (1987). Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings. This Board has held that where a claimant's alleged discovery point is inaccessible due to caving, the Government is not responsible for restoring the accessibility of the site in order to conduct a mineral examination. United States v. Clemans, 45 IBLA 64, 71 (1980).

Even if we accepted as true all the evidence presented by appellant related to past activity on the claim and appellant's allegations regarding his sampling of the dump on the Eccentric claim, it would not benefit appellant's case. Isolated showings of high values or the existence of mineralization which might encourage further exploration to determine the existence of minerals of such quality and quantity as would justify the expenditure of funds for the development of a mine does not establish the discovery of a valuable mineral deposit. United States v. Gillette, 104 IBLA 269, 275 (1988); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978), aff'd, Melluzzo v. Watt, No. 81-607 (D. Ariz. Mar. 31, 1983), aff'd, No. 83-2056 (9th Cir. Oct. 3, 1983).

[3] Appellant also questions the motive of the Forest Service in seeking the initiation of a contest complaint, indicating that the only reason his claims are being challenged is because of the improvements thereon. We have stated on a number of occasions that the motivation of the Forest Service in seeking the initiation of a contest against a mining claim is irrelevant and that it is not the function of the Board to make inquiries into the reasons for the contest. United States v. Rice, 73 IBLA 128, 132 (1984); United States v. Whitney, 51 IBLA 73, 87 (1980); United States v. MacLaughlin, 50 IBLA 176, 179 (1980): United States v. Morton, 32 IBLA 263, 265 (1977); United States v. Howard, 15 IBLA 139, 144 (1974); United States v. Zuber, 13 IBLA 193, 197-98 (1973). The rationale for this approach by the Board finds its genesis in a Departmental decision issued in the case of United States v. Bergdal, 74 I.D. 245 (1967), which presented the question of whether the Department of the Interior could change the nature of proceedings recommended by the Forest Service for dealing with a mining claimant on National Forest lands. In the case, the Forest Service recommended initiation of a contest. A complaint was issued and following a

2/ Allegations by appellant on appeal that construction of a logging road on the Eccentric claim caused the burial of the adit opening are not borne out by the record (Tr. 19, 73).

hearing, a Departmental hearing examiner found the claim null and void based on lack of discovery of a valuable mineral deposit, but on appeal to BLM's Office of Appeals and Hearings, that office modified the hearing examiner's decision by stating that the claim should not be declared null and void, rather it merely should be subject to the restrictions or limitations of section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612 (1964). 3/ In setting aside that office's decision, the Deputy Solicitor concluded that the Department of the Interior had no authority to change the nature of the proceedings. Therein, he stated that the responsibility for administration of use and occupancy of National Forest lands is vested in the Department of Agriculture, and when the Forest Service determines that it has an administrative need to establish its rights to certain lands which are embraced by mining claims, it may turn to the Department of the Interior for resolution of those rights. He further explained:

> The Forest Service considers Bergdal to be an "occupancy problem." As a matter of Forest Service policy, in these circumstances it recommends that a proceeding be brought to deter-mine the validity of the claim. (Tr. 5). Once the Forest Service recommends the initiation of a contest to determine the validity of a mining claim, upon determination that the elements of a contest are present, it is not the function of this Department to inquire into the reasons or the justifications for the initiation of such a proceeding. [4/]

Id. at 252. Thus, in this case, the fact that appellant alleges that the Forest Service has sought to contest his claims because of the improvements located on certain of those claims is immaterial because, even if that allegation were true, that would not constitute a basis for dismissal of the contest or reversal of the Administrative Law Judge's decision in this case.

Although appellant has requested a further hearing in this case, he has submitted nothing which would indicate that such a hearing would be productive. Under such circumstances, a request for an additional hearing is properly denied. See United States v. Holder, 100 IBLA 146, 148 (1987).

3/ Under that Act, the Government could institute proceedings to determine whether a claim located prior to July 23, 1955, should be subject to the right of the United States to manage and dispose of the surface resources on the claim. If it were determined after hearing that, inter alia, there was no discovery on the claim as of July 23, 1955, the claim could be subjected to the above-described right. See Converse v. Udall, 399 F.2d 616 (1968), cert. denied, 393 U.S. 1025 (1969).

4/ Where another agency recommends initiation of a mining contest, this Department has an obligation to review the proposed charges to assure that there is a proper basis for initiating that contest. United States v. Zuber, supra at 198 n.1.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge